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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Request for Information: Supplemental Nutrition Assistance Program (SNAP)

Retailer Transaction Data

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Notice.

SUMMARY: In light of a recent court decision regarding the availability of Supplemental Nutrition Assistance Program (SNAP) retailer transaction data to the public, the USDA Food and Nutrition Service (FNS) is issuing this Request for Information to help inform FNS' response to the recent court decision and any future policy changes regarding the release of SNAP retailer transaction data. In moving forward, USDA is interested in providing greater transparency. However, the Department also recognizes that any movement in this arena needs to be done carefully, after considering potential consequences and the views of the variety of stakeholders. As a result, this notice requests information from any and all interested parties, with a particular focus on current and former SNAP authorized retailers, as to whether the disclosure of aggregated SNAP redemption data at the individual store level would improve the administration and enforcement of the Food and Nutrition Act of 2008 (the Act) and whether such data is confidential business information.

BACKGROUND: Section 9(c) of the Act, 7 U.S.C. 2018(c), limits the use or disclosure of information received from applicant and participating SNAP retailers. Use and disclosure of such information is limited to purposes directly connected with the administration and enforcement of the Act, or the regulations issued pursuant to the Act, with limited exceptions for law enforcement and use by the Special Supplemental Nutrition Program for Women, Infants, and Children. Section 9(c) imposes criminal penalties for disclosure of such information in a manner not authorized by Federal law or regulation.

Throughout the history of the Program, Section 9(c) of the Act has been interpreted as a withholding statute that includes SNAP retailer redemption information. On September 22, 1978, FNS published a final rule codifying the interpretation that Section 9(c) prohibited the use or disclosure of “information furnished by firms, including . . . their redemptions of coupons, . . . except for purposes directly connected with the administration and enforcement of Food Stamp Act and these regulations.” 43 FR. 43,272, 43,275 (Sept. 22, 1978) (currently codified at 7 CFR 278.1(q)). FNS has operated in accordance with its interpretation of the Act and FNS regulations that the Secretary did not have authority to release this information.

However, South Dakota’s Argus Leader newspaper challenged this interpretation of the Act. In February of 2011, through the Freedom of Information Act (FOIA), the Argus Leader requested annual SNAP retailer redemption data for all SNAP authorized retailers for the six-year period spanning from 2005 through 2010. Though the initial FNS decision to withhold this data was upheld by the U.S. District Court for the District of South Dakota, on January 28, 2014, the U.S. Court of Appeals for the Eighth Circuit issued an opinion in favor of Argus Leader. The appeals court opinion contended that SNAP retailer redemption information did not fall within the withholding contemplated by Section 9(c) of the Act and therefore such information was not

exempt from disclosure under Exemption 3 of FOIA.

The Eighth Circuit decision did not address Exemption 4 of FOIA, 5 U.S.C. 552(b)(4), which exempts “trade secrets and commercial or financial information obtained from a person and privileged or confidential” from release under FOIA. FNS recognizes that, despite the decision on Section 9(c) of the Act, the Agency must also consider whether this redemption data constitutes confidential business information. To make a determination in this regard, FNS is required to solicit feedback from the submitters of the retailer transaction data.

REQUEST FOR INFORMATION: FNS’ objective is twofold: (1) to meet FNS’ obligations to solicit feedback from the submitters of retailer transaction data which is the subject of the litigation described above; and (2) to determine how to provide greater transparency, while remaining consistent with our legal obligations and reflecting input from the public. FNS will use this public input to inform FNS’ response to the court decision and consideration of what, if any, adjustments should be made to SNAP regulations in the future. It is FNS’ intent that any regulatory changes would govern the availability of data after the effective date of those regulations, and not be retroactive. FNS is seeking public input on the following questions:

1. Are aggregated annual SNAP redemption data at the individual store level confidential business information? If yes, please explain why the disclosure is likely to cause substantial competitive harm and fully explain all other grounds upon which you oppose the disclosure of such information. Also, please indicate whether the size of the retailer affects any identified competitive harm.
2. Are aggregated monthly SNAP redemption data at the individual store level confidential business information? If yes, please explain why the disclosure is likely to cause substantial

competitive harm and fully explain all other grounds upon which you oppose the disclosure of such information. Also, please indicate whether the size of the retailer affects any identified competitive harm.

3. Should aggregated annual SNAP redemption data at the individual store level be released for transparency purposes?
 - If yes, describe in detail why this data should be released for the purposes of transparency and public accountability, and specifically how this data would assist in the administration of the Food and Nutrition Act.
 - If no, please provide details as to how release of this data would be counter to the administration and enforcement provisions of the Act.
 - When considering the impact of the release of this data on the administration and enforcement provisions of the Act, please consider the effect, if any, on SNAP recipients.
4. Should aggregated monthly SNAP redemption data at the individual store level be released for transparency purposes?
 - If yes, describe in detail why this data should be released for the purposes of transparency and public accountability, and specifically how this data would assist in the administration of the Food and Nutrition Act.
 - If no, please provide details as to how release of this data would be counter to the administration and enforcement provisions of the Act.
 - When considering the impact of the release of this data on the administration and enforcement provisions of the Act, please consider the effect, if any, on SNAP recipients.
5. For each of the above questions, how would answers differ if the monthly or annual aggregated data were for a retailer's aggregated sales at all stores within a state or nationally,

as opposed to per-store data? Should any other aggregations be considered?

Commenters who were SNAP-authorized retailers from 2005 through 2010 should make that fact clear in their comments.

DATES: To be assured of consideration, written comments must be submitted on or before [INSERT DATE THAT IS 35 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments must be submitted through the Federal eRulemaking Portal at www.regulations.gov. Follow the online instructions for submitting comments electronically.

All comments submitted in response to this notice will be included in the record and will be made available to the public at www.regulations.gov. Please be advised that the substance of the comments, including any personal or confidential business information, and the identity of the individuals or entities commenting will be subject to public disclosure.

FOR FURTHER INFORMATION CONTACT: Vicky T. Robinson, Acting Chief, Retailer Management and Issuance Branch, Food and Nutrition Service, (703) 305-2476.

SUPPLEMENTARY INFORMATION: At the end of fiscal year (FY) 2013, over 250,000 retailers were authorized to redeem SNAP benefits. According to the FY 2013 data, 82 percent of all benefits redeemed were redeemed at supermarkets, large grocers and superstores. Approximately 18 percent of benefits were redeemed at smaller stores, including convenience stores, small grocers and farmers' markets. Less than one percent were redeemed by authorized

treatment programs, group homes, homeless meal providers, communal dining facilities and shelters as provided for in statute. A 2009 FNS study on benefit use indicates that 96.3 percent of all SNAP beneficiaries shopped at supermarkets or superstores at least once each month.

Dated: July 28, 2014.

Audrey Rowe,
Administrator,
Food and Nutrition Service.

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